Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Filed in Term Beginning
October 5, 1998 to October 3, 1999

L.J. DOUCET, and wife, PAT DOUCET
Petitioners and Appellants
v.
OWENS CORNING FIBERGLAS, INC.,
Respondent and Appellee

On Petition For Writ of Certiorari
To the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

ROXIE HUFFMAN VIATOR
Attorney at Law
2728 Western Avenue
Orange, Texas 77630
(409) 883-8360 Phone & Fax
Texas Bar No. 10192900
ATTORNEY OF RECORD
FOR L.J. DOUCET, & wife,
PAT DOUCET,
PETITIONERS & APPELLANTS

57pp

(A). QUESTION PRESENTED FOR REVIEW

> Can Texas courts deprive litigants of their Constitutional rights to a fair and impartial jury trial and interpret their statutory procedural rules concerning intentional juror perjury and misconduct (known by the Defendant and denied) so as to turn a blind eye to a citizen's rights under the United States Constitution as interpreted by many federal courts, as well as the highest courts of other states, in identical issues?

Recent decisions of the Texas courts admit their jury misconduct rule is unconstitutional, but continue to deny the Doucets a new trial on his properly-assigned error.

(B). LIST OF ALL PARTIES

Petitioners:	***Represented by:***
Mr. & Mrs. L.J. Doucet	Mrs. Roxie Huffman Viator *Attorney at Law* 2728 Western Avenue Orange, Texas 77630
Respondent:	
Owens Corning Fiberglas	Mr. Jeffery Mundy *Brobeck, Phleger & Harrison* 301 Congress, Suite 1200 Austin, Texas 78701

(C). TABLE OF CONTENTS

Page No.:

(A). Question Presented for Review ..... *i*

(B). List of all Parties ..... *ii*

(C). Table of Contents ..... *iii*

Table of Authorities Cited ..... *iv - v*

(D). Citations to Opinions and Orders entered in the case by courts below 1

(E). Jurisdictional Basis ..... 1 - 3

(F). Verbatim Constitutional Provisions, State Statutes and Rules involved ..... 3 - 5

(G). Statement of the Case ..... 5 - 8

(H). Argument ..... 8 - 11

(I). Appendix ..... A-1 -- A-41

TABLE OF CITED AUTHORITIES

1. **Constitutional Provisions**
U.S. CONSTITUTION,
Art. VI.; & Amdmts. 5, 7, & 14 ..... 8, 10

2. **Statutes and Rules**
TEX.R.CIV.P. 320 4
TEX.R.CIV.P. 327(a) 4
TEX.R.CIV.P. 327(b) 4

3. **(i) Court Opinions -**
Federal:
Consol. Gas & Eqpmt. Co. v. Carver,
257 F.2d 111, 115 (10th Cir. 1958) 10

U.S. v. Chapman, 158 F.2d 417, 419
(10th Cir. 1946), cert. denied 335 U.S.
860, 69 S.Ct. 134, 93 L.Ed. 406 9

(ii) Court Opinions -
Texas - State:
Doucet v. Owens-Corning Fiberglas Corp.,
966 S.W.2d 161 (Tex.App.--Bmt. 1998,
writ denied) 1, 5, 6, 7

Jackson v. Golden Eagle Archery, Inc.,
974 S.W.2d 952, 957
(Tex.App.--Bmt. 1998) 2, 3, 7, 8, 10

Reese v. Brittain, 570 S.W.2d 528, 532-533
(Tex.App.--Houston [14th Dist.] 1995) 10

TABLE OF CITED AUTHORITIES (Con't.)

Wooten v. So.Pac. Transp. Co., 928 S.W.2d 76, 79 (Tex.App.--Houston [14th Dist.] 1995) .. 11

(iii) Court Opinions -
Other - State:

Allen v. Ramada Inn, Inc., 778 P.2d 291, 292-293 (Colo.App. 1989) cert. denied 10

Collier v. Westland Arena, Inc., 454 N.W.2d 138, 140 (Mich.App 1990) per curiam, 183 Mich.App. 251 10

Gillespie v. Goedecke, 782 S.W.2d 467, 468-469 (Mo.App. 1990) 10

Perl v. K-Mart Corp., 493 So.2d 542, 542-543 (Fla.App. 3 Dist. 1986) 10

Robinson v. Safeway Stores, Inc., 776 P.2d 676, 679-680 (Wash. 1989) 10

Williams v. Barnes Hosp., 736 S.W.2d 33, 37-38 (Mo. banc 1987) 10

(D). CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS BELOW

Doucet v. Owens-Corning Fiberglas Corp., 966 S.W.2d 161 (Tex.App.--Bmt. 1998, writ denied)

(E). JURISDICTIONAL BASIS

(i) Date of Judgment of Texas Supreme Court -

July 16, 1998, affirming the appellate court's March 26, 1998 opinion on Motion for Rehearing, and the trial court's judgment that Petitioner take nothing dated November 9, 1995.

(ii) Date of Order on Rehearing by Texas Supreme Court -

September 3, 1998.

(iii) Statutory Provision Conferring Jurisdiction on this Court to Review on a Writ of Certiorari the Judgment in Question -

28 U.S.C. Sec. 1257(a); Rule 10 (b) & (c).

I. Although Texas courts recently admit their jury misconduct rule is unconstitutional, Texas courts refused to follow the doctrine of *stare decisis* on identical and proper Constitutional challenges to the rule and deny Petitioners a new trial:

a. when proven intentional and material juror perjury on *voir dire* (actually known and denied by the Respondent at that time)

prevented the Doucets from intelligently exercising their peremptory challenges and challenges for cause, so as to effectively deny these rights altogether; and

b. where it is also established that intentional misconduct occurred when the Jury Foreman introduced outside lay definitions of the primary causes of action, violating the court's charge to the jury.

II. The holding by the Texas court in the case at bar is contrary to other Texas decisions as to the Constitutionality of the rule governing jury misconduct, and is grossly repugnant to the United States Constitution, and contrary to the holdings and interpretations concerning identical issues as held by:

a. Federal Courts in these instances; as well as;

b. The highest courts of other states; **28 U.S.C. Sec. 1257(a); Rule10 (b) & (c)**

c. Decisions from the same Texas court; **Jackson v. Golden Eagle Archery, Inc., 974 S.W.2d 952, 957 (Tex.App.-- Bmt. 1998).**

(iv) Required Notifications Under Rule29 (4)(c) -

Petitioners herein challenge the Constitutionality of Texas statutory rules of procedure, and the interpretation of those rules used to deny their rights to a fair and impartial jury trial in their civil suit for work-related

personal injuries which Texas courts admit is unconstitutional in Jackson v. Golden Eagle Archery, Inc., 974 S.W.2d 952, 957 (Tex.App. --Bmt. 1998). Accordingly, the Texas Attorney General has been served with a copy of this instrument filed herein, as well as all other instruments, as 28 U.S.C. Sec. 2403(b) may apply.

(F). VERBATIM CONSTITUTIONAL PROVISIONS, STATE STATUTES AND RULES INVOLVED

Article VI of the United States Constitution

" ... This Constitution, ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. ... "

5th Amendment to the United States Constitution

" ... nor shall any person ... be deprived of life, liberty, or property, without due process of law; ... "

7th Amendment to the United States Constitution

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; ... "

14th Amendment to the United States Constitution

" ... No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ... "

TEX.R.CIV.P. 320 -

"New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct."

TEX.R.CIV.P. 327 -

(a) **"When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that a juror gave an erroneous or incorrect answer on *voir dire* examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct is proved, or the communication made, or the erroneous or incorrect answer on *voir dire* examination be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party."**

(b) **"A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may**

testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

(G). STATEMENT OF THE CASE

Suing for work-related personal injuries and loss of consortium, the Doucet Petitioners tried their civil suit against Owens Corning in state district court. (Record 264-273) Judgment was ultimately rendered in favor of Owens Corning, Respondent herein. (Record 624-637; 666-667) However, a Constitutional defect existed in the jury verdict (Record 606; 641-667; 678; 681-824): The Doucets were denied their rights to a fair and impartial trial of their civil suit by intentional jury perjury and misconduct directly prejudicing the Doucets' Constitutional rights, including those to effectively exercise their rights to peremptory challenges and challenges for cause.

(i) Jurisdiction Preserved on Federal Question -

The Doucet Petitioners have preserved error beginning in the trial court concerning the denial of their Constitutional rights to a fair and impartial jury trial. (Record 606; 641-667; 678; 681-824) In the Doucets' 2nd Motion for New Trial, which the 9th Court of Appeals in Texas found was timely filed in the trial court (Doucet, at 165), the Petitioners alleged that:

1. **"Owens Corning knew this was not a constitutional jury panel, ..." at the time of *voir dire* because both Owens Corning, and its counsel of record, actually participated in the**

juror's identical pending personal injury suit against the same Defendant, Owens Corning, and its same identical counsel of record. (Record 683-686)

2. **The Doucet "Plaintiffs have been denied their constitutional right to trial by an impartial jury of 12, by Juror Bergeaux's untruthful response to the information requested of him concerning whether he has ever been a party to a lawsuit."**

In the appellate court, the Doucet Petitioners further preserved their Constitutional complaint in the Brief of Appellants at Point of Error No. I:

"I. REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT DENIED APPELLANTS' CONSTITUTIONAL RIGHT TO A TRIAL WITH A FAIR AND IMPARTIAL JURY AND DENIED A NEW TRIAL WHEN ONE JUROR HAD AN IDENTICAL LAWSUIT PENDING, WHICH THE JUROR CONCEALED UNDER OATH, BOTH ON *VOIR DIRE* AND ON HIS JUROR QUESTIONNAIRE."
(Record 641-665, 681-821; S.F. Vol. II 37-39, 42-43, 81-86, 96, 107-121, 151-153, 176-180, 255-259)

In its opinion of Doucet v. Owens-Corning Fiberglas Corp., 966 S.W.2d 161 (Tex.App.--Bmt. 1998, writ denied), the appellate court found that Juror Bergeaux was intentionally "untruthful" in response to the *voir dire* questions, and that the Juror's misconduct was "material" to the Doucets' case. Doucet, at 165. However, the appellate court failed to find harm, or a Constitutional violation of the Doucets' rights, resulting from the Juror's material and intentional

perjury, and totally ignored the harm to, and deprivation of, the Doucets' federal Constitutional rights to a fair and impartial jury trial. Doucet, at 165.

Petitioners' Constitutional arguments were further timely asserted before the Texas Supreme Court, and denied. (Petitioners' Petition for Review by Texas Supreme Court, at pgs. 8-10; Petitioners' Motion for Rehearing to Texas Supreme Court, at pgs. 11-14). However, in Jackson v. Golden Eagle Archery, Inc., 974 S.W.2d 952, 957 (Tex.App.--Bmt. 1998), the same Texas appellate court admitted the rule governing jury misconduct was unconstitutional.

At all times material hereto, counsel of record for the Doucets has maintained, and documented by her Affidavit filed in the trial court, that if counsel had known that Juror Bergeaux had an identical pending suit for personal injury against the same identical Defendant (Owens Corning) and its identical counsel of record in both cases, and that the Juror's suit was filed by a different and competing local plaintiffs' attorney in the same city, Petitioners would have stricken said Juror from the prospective panel using either a peremptory challenge, or validly challenging Juror Bergeaux for cause (which in all likelihood would have been granted by the trial court, had Petitioners' counsel only known the truth and had the information upon which to present her challenge against Juror Bergeaux). (Record 681-682; 816; Appellants' Motion for Rehearing filed in the 9th Appellate Court, at pg. 9; Petitioners' Petition for Review by the Texas Supreme Court, at pg. 9; Petitioners' Motion for Rehearing to the Texas Supreme Court, at pgs. 11 & 13) (S.F. Vol. II, at pgs. 212-231 [examples of Jurors the trial court excused from jury service, sustaining challenges for cause]).

Petitioners were denied their rights to a fair and impartial jury trial in the courts below, and this denial constitutes reversible error, as well as an abuse of discretion. This injury is compounded by the Texas courts determining their jury misconduct rule is unconstitutional on identical assigned Points of Error, while ignoring the Doucets' vested rights to a new trial on the same basis. Jackson, at 957. For these reasons, the Doucets seek a new trial of their case which comports with their Constitutional rights and *stare decisis*.

Petitioners cannot obtain further review of this matter in the Texas courts; all other remedies have been exhausted.

(H). ARGUMENT

The Doucet Petitioners respectfully request this Honorable Court to grant their Petition for Writ of Certiorari in this case because Petitioners were denied a fair and impartial jury trial of their personal injury suit in the courts below, comporting with substantial justice and the requirements of due process of law as guaranteed in our Constitution. U.S. CONSTITUTION, Art. VI; & 5th, 7th & 14th Amdmts. The Texas courts themselves admit the jury misconduct rule in question is unconstitutional. Jackson v. Golden Eagle Archery, Inc., 974 S.W.2d 952, 957 (Tex.App.--Bmt. 1998). The right to a fair and impartial jury trial is an expected and basic right in our society. However, the decisions from the Texas courts in the case at bar totally overlook the denigration of the Doucets' Constitutional guarantees as citizens of this country, and are repugnant to the Constitution as admitted in decisions from the same Court of Appeals. Jackson, at 957. Further, the decisions by the Texas courts conflict with holdings of the Federal Circuit Courts, as well as the

holdings of the highest courts of other states, concerning instances of material and intentional juror perjury. 28 U.S.C. Sec. 1257(a).

In U.S. v. Chapman, 158 F.2d 417, 419 (10th Cir. 1946), cert. denied 335 U.S. 860, 69 S.Ct. 134, 93 L.Ed. 406, a land condemnation case, the Tenth Circuit held that the question of:

> "Whether a juror is prejudiced or partial in the sense that one of the parties is denied a fair and impartial trial ... is one of vital substantive law under the Constitution, to be resolved according to the highest standards of human conduct." (emphasis added) Chapman, at 419.

The Petitioners in the case at bar, just like the Federal government in the Chapman case, were entitled to have their case tried "before a jury of 12 impartial and unbiased jurors", in a "fair and impartial trial." Chapman, at 419. The question concerning the suspect juror in the Chapman case was whether he was prejudiced against the government, and in favor of the land owner requesting fair compensation in a condemnation case. Moreover, the suspect juror in Chapman had testified as an expert witness against the government in another landowner's case, with the same other landowner being an expert witness in the Chapman case (with the former expert witness now on the Chapman jury). Chapman, at 420-421. The Tenth Circuit held in Chapman that it was reversible error for the trial court not to discharge the juror, who had been an expert witness, upon the government's challenge for cause, and that the jury verdict, rendered was contaminated. Chapman, at 421.

Likewise in Consolidated Gas & Eqpmt. Co. v. Carver, 257 F.2d 111, 115-116 (10th Cir. 1958), a juror with a similar pending personal injury suit, such as Juror Bergeaux in the case at bar, was held not to be a competent juror. Carver, at 116. The Carver decision further points out that, even though the verdict was unanimous, the verdict's integrity was premised upon only eleven competent jurors, and not twelve as required. Carver, at 116.

The issues in the case at bar involve substantive and Constitutional rights of this great Nation as to the right to a fair and impartial jury trial, and the right to intelligently select a competent jury, as well as the denial of the effective use of peremptory challenges and challenges for cause. Art. VI, & Amdmts. 5, 7 & 14, U.S. CONSTITUTION. Although the Texas jury misconduct rule is held to be generally unconstitutional, an error of law has been committed by the Texas courts below in denying the Doucets a new trial concerning important fundamental Constitutional and substantive rights to a jury trial. The jurisprudence of this great Nation requires correction of this error of law, in conformity with the decisions in similar circumstances by the highest federal courts and courts of other states. Art. VI, & Amdmts. 5, 7 & 14, U.S. CONSTITUTION; Jackson, at 957; Carver, at 115; Williams v. Barnes Hosp. 736 S.W.2d 33, 37-38 (Mo. banc 1987); Allen v. Ramada Inn, Inc., 778 P.2d 291, 292-293 (Colo.App. 1989) cert. denied; Collier v. Westland Arena, Inc., 454 N.W.2d 138, 140 (Mich.App. 1990) per curiam, 183 Mich.App. 251; Perl v. K-Mart Corp., 493 So.2d 542, 542-543 (Fla.App. 3 Dist. 1986); Robinson v. Safeway Stores, Inc., 776 P.2d 676, 679-680 (Wash. 1989); Gillespie v. Goedecke, 782 S.W.2d 467, 468-469 (Mo.App. 1990); Reese v. Brittain, 570 S.W.2d 528, 532-533 (Tex.Civ.App.--Amarillo 1978, writ ref'd n.r.e.);

Wooten v. So.Pac. Transp. Co., 928 S.W.2d 76, 79 (Tex.App.--Houston [14th Dist.] 1995).

WHEREFORE, PREMISES CONSIDERED, the Doucet Petitioners pray that their Petition for Writ of Certiorari be in all things granted, and that upon conclusion that the above-entitled cause of action be remanded back to the trial court for a new trial, and for such other and further relief to which Petitioners may be justly entitled to receive, at law or in equity, specific or general.

Respectfully submitted,

By:

ROXIE HUFFMAN VIATOR
Attorney at Law
2728 Western Avenue
Orange, Texas 77630
(409) 883-8360 Phone & Fax
Texas Bar No. 10192900
FOR L.J. DOUCET, & wife,
PAT DOUCET,
PETITIONERS & APPELLANTS

(I). APPENDIX

1) **Opinions Entered in conjunction with take nothing Judgment Sought to be Reviewed** -

(i) Judgment of trial court dated November 9, 1995. (attached)

(ii) Published Opinion of the 9th District Court of Appeals for the State of Texas dated March 26, 1998 on Motion for Rehearing. Doucet v. Owens-Corning Fiberglas Corp., 966 S.W.2d 161 (Tex.App.--Bmt. 1998, writ denied)

(iii) Judgment Sought to be Reviewed - Same as (ii), above.

(iv) Essential supporting Constitutional provisions, rules, and case law.

Article VI of the United States Constitution

> **" ... This Constitution, ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. ... "**

5th Amendment to the United States Constitution

> **" ... nor shall any person ... be deprived of life, liberty, or property, without due process of law; ... "**

7th Amendment to the United States Constitution

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; ... "

14th Amendment to the United States Constitution

> " ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ... "

TEX.R.CIV.P. 320 -

> "New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct."

TEX.R.CIV.P. 327 -

(a) "When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that a juror gave an erroneous or incorrect answer on *voir dire* examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct is proved, or the communication made, or the erroneous or incorrect answer on *voir dire* examination be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the

case and from the record as a whole that injury probably resulted to the complaining party."

(b) "A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes."

Jackson v. Golden Eagle Archery, Inc., 974 S.W.2d 952, 957 (Tex.App.--Bmt. 1998)

L.J. DOUCET & wife PAT DOUCET, Plaintiffs,
vs.
A.C.&S., INC., et al, Defendants

NO. B-911067-C

In the 163rd Judicial District Court of Orange County, Texas

JUDGMENT

On the 2nd day of October, 1995, came on to be heard the above-entitled and numbered cause. Plaintiffs L.J. Doucet and wife, Pat Doucet, appeared in person and by their attorneys, Roxie Huffman Viator and Jackie Rion, and announced ready for trial, and defendant

Owens-Corning Fiberglas Corporation, appeared by and through their counsel, Paula Heirtzler Dunham and Beth Morrison Klein, and likewise announced ready for trial. All other defendants had previously announced that plaintiffs' claims against them had either been settled or were dismissed with prejudice. A jury having previously been demanded and the fee therefor paid, a jury of twelve qualified jurors was duly empaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the questions of fact in the case to the jury. The charge of the Court and the verdict of the jury are incorporated for all purposes by reference. Because it appears to the Court that the verdict of the jury, after reducing the amount of damages awarded by the jury by fifty percent (50%), the percentage equal to the jury's finding of L.J. Doucet's percentage of responsibility, results in a finding on favor of the plaintiff, L.J. Doucet, and against the defendant, Owens-Corning Fiberglas Corporation, in the amount of $50,000, an amount less than the credit to which Owens-Corning Fiberglas Corporation is entitled pursuant to Section 33.012(b)(1) of the Texas Civil Practice and Remedies Code, judgment should be rendered on the verdict in favor of defendant Owens-Corning Fiberglas Corporation and against the plaintiffs.

IT IS THEREFORE ORDERED THAT plaintiffs L.J. Doucet and wife, Pat Doucet take nothing by this suit and that defendant Owens-Corning Fiberglas Corporation is hereby discharged to go hence without day. Defendant Owens-Corning Fiberglas Corporation shall pay of the costs of court incurred by plaintiffs L.J. Doucet and wife, Pat Doucet. All other costs of court are taxed against the party incurring same.

All other relief not expressly granted herein is denied.

SIGNED this 9th day of November, 1995.

/s/ David A. Dunn
Judge Presiding

APPROVED AS TO FORM:

/s/ Paula H. Dunham
Paula H. Dunham
State Bar No. 09383600
ATTORNEY FOR DEFENDANT
OWENS-CORNING FIBERGLAS CORPORATION

L.J. DOUCET and Wife, Pat Doucet, Appellants,
v.
OWENS-CORNING FIBERGLAS CORPORATION, Appellee.

No. 09-96-065 CV.

Court of Appeals of Texas, Beaumont.

Submitted Nov. 13, 1997.
Decided March 26, 1998.

Action was brought against manufacturer for injuries related to asbestos exposure. The District Court, Orange County, David A. Dunn, J., entered take-nothing judgment against plaintiffs. Plaintiffs appealed. On motion for rehearing, the Court of Appeals, Stover, J., held that: (1) juror's false answer on the juror information card and his failure to respond to specific voir dire questions which

pertained to him did not warrant new trial, and (2) plaintiffs waived challenge to any reliance by jury on definitions provided by nonmember.

Affirmed.

[1] TRIAL k304
388k304
Misconduct of the jury, under certain circumstances, may deprive a person of a fair trial. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15.

[2] JURY k10
230k10
Trial by jury is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. U.S.C.A. Const.Amends. 6, 14.

[3] JURY k1
230k1
Without the purity of the jury, there can be no administration of justice. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15.

[4] TRIAL k304
388k304
If jury misconduct, whatever form it may take, is present, the integrity of the jury system is compromised, and a fair trial cannot be had. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15.

[5] NEW TRIAL k44(1)
275k44(1)
To obtain a new trial on the ground of jury misconduct, the complaining party must show: (1) that the misconduct occurred; (2) that it was material; and (3) that, based on the

record as a whole, the misconduct resulted in harm to them. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15.

[5] NEW TRIAL k56
275k56
To obtain a new trial on the ground of jury misconduct, the complaining party must show: (1) that the misconduct occurred; (2) that it was material; and (3) that, based on the record as a whole, the misconduct resulted in harm to them. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15.

[6] APPEAL AND ERROR k977(5)
30k977(5)
A trial court has wide discretion in denying a motion for new trial, and its action will not be disturbed on appeal absent a showing of an abuse of discretion.

[6] NEW TRIAL k6
275k6
A trial court has wide discretion in denying a motion for new trial, and its action will not be disturbed on appeal absent a showing of an abuse of discretion.

[7] NEW TRIAL k27
275k27
Juror's false answer on the juror information card and his failure to respond to specific voir dire questions which pertained to him did not warrant new trial in suit for injuries caused by asbestos exposure; although fact that juror had a suit against manufacturer for asbestos-related injuries was material, it did not result in any bias or prejudice against plaintiff as challenging party. Vernon's Ann.Texas Rules Civ.Proc., Rule 327(a).

[8] NEW TRIAL k56
275k56
To show probable injury by juror misconduct as required for new trial, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 327(a).

[9] APPEAL AND ERROR k882(16)
30k882(16)
Plaintiffs waived their right to object, on appeal, to alleged juror misconduct which occurred when juror relied on the definition of negligence and gross negligence given to him by his wife, who was not member of the jury panel, where plaintiffs actively opposed defendant's mistrial motion.

[10] APPEAL AND ERROR k882(1)
30k882(1)
A party cannot encourage the court to take a particular action and then complain on appeal that the trial court erred by taking it.

*162 Roxie Huffman Viator, Orange, for appellant
Paula A. Heirtzler, Bernsen, Jamail & Goodson, Beaumont, William J. Cozort, Bean & Manning, Houston, for appellee.

Before WALKER, C.J., and BURGESS and STOVER, JJ.

OPINION ON MOTION FOR REHEARING

STOVER, Justice.

We withdraw our opinion of January 29, 1998, and substitute the following in its place to address a concern raised in appellants' motion for rehearing.

BEST AVAILABLE COPY

In a suit brought by appellants L.J. Doucet and wife Pat Doucet ("Doucet") against appellee Owens-Corning Fiberglass Corporation ("OCF") for injuries caused by exposure to asbestos, the jury returned a verdict of $100,000 in favor of Doucet. However, because of the contributory negligence finding by the jury and the dollar-for-dollar credit for pretrial settlements, Doucet ultimately received nothing from the judgment. Appellants appeal from the take-nothing judgment rendered against them.

In the first point of error, appellants complain that their constitutional right to a fair and impartial jury was denied because of juror misconduct; they further contend the trial court erred in failing to grant a motion for new trial on that ground. The alleged misconduct involves Juror Elray Bergeaux, who, in filling out his juror information card, checked "no" in his answer to the question inquiring whether he had ever been a party to a lawsuit. According to Doucet, the juror's answer is false. Claiming the juror made other untruthful responses, Doucet also points to jury voir dire wherein Elray Bergeaux failed to respond affirmatively to a specific question by appellee's counsel asking if there was "anyone on the panel who, either themselves or a family members [sic], has made a claim for asbestos-related injuries [.]" Bergeaux likewise did not respond during voir dire to a question asking "how many people on the panel have personally worked with asbestos-containing products to the best of their knowledge[.]" On appeal, appellants maintain the juror's lack of response is tantamount to a negative answer and, like the answer on the juror information card, is untrue.

The first allegation of misconduct regarding Juror Bergeaux's untruthfulness came in the motion for a new trial. [FN1] Appellants sought to establish that, in addition

to sitting on the jury in the instant case, Bergeaux was also a plaintiff in a personal injury asbestosis suit against OCF. As evidence, appellants attached to their motion for a new trial a copy of Elray Bergeaux's juror information card, as referenced above, showing his address to be 3819 Meeks Dr. No. L 5, Orange, Texas 77630; a copy of a suit filed by Elray Bergeaux and Louwana Bergeaux in 1990 against OCF and others for personal injuries caused by exposure to asbestos (showing OCF as a defendant and showing Bergeaux's wife's name to be Louwanna); a copy of OCF's answer to Bergeaux's suit (showing the same attorney represented OCF in Bergeauxs' suit and in Doucets' suit); and Bergeaux's divorce petition and divorce decree (showing his address to be the same as that on the juror information card and his wife's name to be Louwana). Based upon our review of the evidence attached to appellants' motion for new trial, we conclude Doucet established the Elray Bergeaux who was a juror in the instant case is the same Elray Bergeaux who sued OCF for personal injury ***163** in an asbestosis suit. Because of the evidence showing Bergeaux was a litigant in a lawsuit, we further conclude the juror was untruthful on the juror information card and that his failure to respond to specific voir dire questions asking whether he had ever been involved in litigation and whether he had ever worked with asbestos-containing products was, in effect, a "no" answer and, likewise, untruthful.

FN1. Appellants initially filed a motion for new trial with a copy of Juror Bergeaux's juror information card attached as evidence, as well as a copy of a suit by Elray Bergeaux and Louwana Bergeaux against OCF, among others. The trial court denied Doucet's motion for new trial. Appellant then timely filed a second motion for new trial with additional evidence attached. Although appellant did not file a motion requesting permission to file the

second motion for new trial, we conclude the trial court, in effect, gave its permission to do so by holding a hearing on the second motion.

[1][2][3][4] Misconduct of the jury, under certain circumstances, may deprive a person of a fair trial. Trial by jury is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Additionally, the right is embodied in Article I ' 15 of the Texas Constitution:

> Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

The constitution's reference not only to the right of trial by jury, but also to the purity of the jury, embraces the fundamental principles of impartiality and freedom from bias. Without the purity of the jury, there can be no administration of justice. If jury misconduct--whatever form it may take--is present, the integrity of the jury system is compromised, and a fair trial cannot be had. Rule 327(a)of the Texas Rules of Civil Procedure pertains to jury misconduct, which, according to the rule, is a proper ground for a motion for new trial:

> a. When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made, or the erroneous or incorrect

> answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party. [FN2]

FN2. The interpretive commentary following the 1955 amended version of Rule 327 states:

> This rule does away with the presumption of prejudice from jury misconduct established by a long line of Texas decisions.

Under this Rule a new trial should not be granted because of jury misconduct unless it reasonably appears from the record as a whole that injury probably resulted.

> .... Manifestly, the rule of presumed harm, which seems to have been the basis of the Wade, [Texas Employers' Ins. Association v. Wade, Civ.App.1946, 197 S.W.2d 203, error ref. n.r.e.] Cossman [Traders & General Ins. Co. v. Cossman, Civ.App.1948, 212 S.W.2d 865, error ref. n.r.e.] and Kurth [Dallas Ry. & Terminal Co. v. Kurth, Civ.App.1952, 247 S.W.2d 930, error ref. n.r.e.] decisions is no longer the law.

In order that there might be no doubt about its attitude on this subject, the Supreme Court of Texas promulgated an amendment to Rule 327, Tex.R.C.P., effective January 1, 1955. It is there stated in plain language that a reversal may not be ordered unless the information withheld on the voir dire examination was material and further that, in the light of the record as a whole, it must appear that probable injury resulted to the appealing party.
Tex.R.Civ.P. 327(a) (emphasis added).

[5][6] To obtain a new trial on the ground of jury misconduct, the complaining party must show (1) that the misconduct occurred; (2) that it was material; and (3) that, based on the record as a whole, the misconduct resulted in harm to them. Ortiz v. Ford Motor Credit Co., 859 S.W.2d 73, 76 (Tex.App.--Corpus Christi 1993, writ denied). "A trial court has wide discretion in denying a motion for new trial, and its action will not be disturbed on appeal absent a showing of an abuse of discretion." Sanchez v. King, 932 S.W.2d 177, 180 (Tex.App.--El Paso 1996, no writ) (citing Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex.1983)).

As noted above, one of the allegations of jury misconduct in this case is the assertion that Juror Bergeaux was untruthful in his responses during voir dire and on the juror information card. [FN3] Applying Rule 327(a) to *164 the alleged misconduct, as we are required to do, we must determine whether such misconduct was material and, whether, based on the record as a whole, the misconduct probably resulted in harm to appellant. [FN4]

FN3. Apparently, juror misconduct is becoming a significant problem in courtrooms across the country. We quote the following from a recent article:

> Only a small proportion of the 562 judges responding to a survey reported that they had become convinced in the course of a trial during the past three years that any of ten forms of jury misconduct had occurred. For three kinds of misconduct that are easiest for judges to observe themselves, the picture was different. Seventy-three percent of responding judges reported that venire members had not told the truth during voir dire in at least one of the cases they had

> tried in the last three years; 8 percent responded that venire members were untruthful in many, most, or all cases. Sixty-nine percent of the judges reported cases in which jurors had fallen asleep, and 80 percent of the judges reported that jurors, after being sworn in, had not reported to court or reported late. A higher proportion of state judges than federal judges reported misconduct for almost every category of misconduct.
>
> Misconduct apparently is not often the basis for a successful new trial motion, with only 7 percent of the judges reporting that they had ordered even one new trial because of misconduct during the past three years.
>
> Nancy J. King, Juror Delinquency in Criminal Trials in America, 1796-1996, 27 No. 2 The Vanderbilt Lawyer 23, 25 (1997).

FN4. Regrettably, a juror's statement, even though untrue, is not automatically material under the rule, and, even if material may not be harmful.

[7] The determination of the materiality prong in the instant case is not a difficult one. Bergeaux's false answer on the juror information card and his failure to respond to specific voir dire questions which pertained to him are material to the case. The fact that a juror on the panel currently has, or previously had, a suit against one of the parties in the case and failed to be truthful about it is material to the jury selection process. Moreover, the fact that the suit Bergeaux filed against OCF is, like Doucet's suit against OCF, a claim for damages for asbestos-related injuries is likewise material to that process. It is readily apparent the misconduct is material. The more difficult issue in the case

is whether injury probably resulted to the complaining party.

In support of his contention of juror misconduct, appellant relies upon General Accident Fire & Life Assurance Corp. v. Coffman, 326 S.W.2d 287 (Tex.Civ.App.--Waco 1959, writ ref'd n.r.e.), which held, under the facts in that case, that a juror's false statement constituted jury misconduct and compromised the integrity of the jury, thereby resulting in reversal and remand:

> [T]he Court erred in not granting it a new trial because of jury misconduct, it being shown that one of the jurors intentionally failed to disclose a previous back injury, and because it was shown that the juror was influenced by his own condition.... On the motion for new trial he further testified to the effect:
>
> > "Q. Do you feel like he would not be able to do too much work or laboring work? A. Not like he always did.
> >
> > "Q. You felt like he would not be able to, judging from your own experience, with a back injury? A. Yes, that's right.
> >
> > "Q. You felt like you had some special knowledge of what a back injury was because you had one? A. Yes, that's right.
> >
> > "Q. And that influenced your decision as to whether or not Coffman should be awarded some compensation or some money or not? A. Yes, it sure did, because if a man's back is injured, he can't do any hard work."
>
> .... We are of the view under this undisputed factual situation that no heavy burden or unreasonable burden should be placed upon defendant to show probable harm.

Id. at 291-92 (emphasis added).

In Coffman, the juror himself testified to being influenced by his lie, thus establishing harm or injury to the complaining party.

[8] The instant case is distinguishable from Coffman. Here, we have no affidavit or testimony by Juror Bergeaux, or any other evidence, establishing any bias or prejudice by Bergeaux against appellants or their case. We cannot manufacture injury by supposition or conjecture. The record reveals Juror Bergeaux voted "yes" in answer to the negligence question, and also voted "yes" in awarding $100,000 in damages to appellants. If any inference is to be drawn from the facts *165 at hand, it is the inference that Juror Bergeaux would be more favorable to a plaintiff who, like himself, has a suit for an asbestos- related injury against the same defendant. "To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he 'would otherwise have done on one or more issues vital to the judgment.' " Pharo v. Chambers County, Tex., 922 S.W.2d 945, 950 (Tex.1996) (quoting Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex.1985)). Though we take strong exception to any misconduct of the jury panel, we are nonetheless bound by the constraints of Rule 327(a) and case law interpreting it. We are unable to find support in the record for any alleged injury to appellants as a result of the jury misconduct. Consequently, we conclude the trial court did not abuse its discretion in denying appellants' motion for new trial. Point of error one is overruled.

[9] In point of error two Doucet again complains of jury misconduct by pointing to the injection into jury deliberations of Juror Ford's recitation of his wife's [FN5] version of the definitions of "negligence" and "gross negligence." The transcript of the hearing at which this

evidence was adduced reveals that after the first juror testified regarding these allegations, OCF urged the trial court to grant a mistrial on the grounds of the alleged outside influence exerted on the jury. Doucet took the position that the motion for mistrial was premature, because the entire jury panel had not been questioned. The trial court then proceeded to hear the testimony of the remaining eleven jurors. At the conclusion of that testimony, OCF again moved for a mistrial on the grounds of outside influence on the jury. Once more Doucet actively opposed the mistrial motion by maintaining there was no outside influence, and, thus, no jury misconduct. In accordance with appellants' urging, the trial court did not grant OCF's motion, the jury was brought back into the courtroom, and the jury's verdict was read.

FN5. Ford's wife was not a juror in the case.

[10] Contrary to their position at trial, appellants in the motion for new trial and on appeal now maintain there was jury misconduct as a result of Juror Ford's "factually erroneous statement of the law ... on both negligence and gross negligence." Appellants' positions at trial and on appeal are inconsistent. A party cannot encourage the court to take a particular action and then complain on appeal that the trial court erred by taking it. Metzger v. Sebek, 892 S.W.2d 20, 42 (Tex.App.--Houston [1st Dist.] 1994, writ denied), cert. denied, 516 U.S. 868, 116 S.Ct. 186, 133 L.Ed.2d 124 (1995) (citing Austin Transp. Study Policy Advisory Comm. v. Sierra Club, 843 S.W.2d 683, 689 (Tex.App.--Austin 1992, writ denied)). Both Doucet and OCF had knowledge of the details of the alleged misconduct of the jury foreman at the completion of the trial court's hearing of the testimony of the twelve jurors. That hearing was prior to the rendering of the jury verdict in open court. By failing to complain of the alleged acts of

misconduct at the time appellant became aware of them and before the verdict was rendered, appellant waived his right to complain of them on appeal. See Union City Body Co., Inc. v. Ramirez, 911 S.W.2d 196, 202-3 (Tex.App.--San Antonio 1995, no writ); Southerland v. Porter, 336 S.W.2d 841, 846 (Tex.Civ.App.--Amarillo 1960, writ ref'd n.r.e.); White v. Yellow Cab Company, 286 S.W.2d 237, 239-40 (Tex.Civ.App.--Beaumont 1955, no writ); Trinity Universal Ins. Co. v. Rose, 217 S.W.2d 425, 427 (Tex.Civ.App.--Eastland 1949, writ ref. n.r.e.). The trial court did not abuse its discretion in overruling appellants' motion for new trial. We overrule appellants' second point of error.

AFFIRMED.

Ronald JACKSON, Appellant,

v.

GOLDEN EAGLE ARCHERY, INC., et al., Appellee.

No. 09-96-302 CV.

Court of Appeals of Texas, Beaumont.

Submitted Jan. 29, 1998.
Decided Sept. 17, 1998.

Plaintiff sued manufacturer of compound bow for injuries sustained in bow accident. Upon jury verdict, the 136th Judicial District Court, Jefferson County, entered judgment awarding plaintiff monetary damages and denied plaintiff's motion for new trial based on jury misconduct. Plaintiff appealed. The Court of Appeals, Stover, J., held that: (1) comments and statements made by juror to other jurors

during deliberations did not amount to "outside influence" and was not admissible to warrant new trial based on jury misconduct; (2) jury's failure to follow court's instructions regarding proper jury conduct did was not admissible as grounds for a new trial; and (3) rule limiting juror testimony to whether any "outside influence" was brought to bear on any juror denied personal injury plaintiff's constitutional right to fair and impartial jury.

Reversed and remanded.

Walker, Chief Justice, filed dissenting opinion.

[1] APPEAL AND ERROR k842(1)
30k842(1)
Determining whether jury misconduct occurred is a question of fact for the trial court, and if there is conflicting evidence on the issue, the trial court's finding must be upheld on appeal.

[1] APPEAL AND ERROR k1024.1
30k1024.1
Determining whether jury misconduct occurred is a question of fact for the trial court, and if there is conflicting evidence on the issue, the trial court's finding must be upheld on appeal.

[2] NEW TRIAL k44(1)
275k44(1)
To establish jury misconduct sufficient to warrant new trial, the complaining party must show (1) misconduct occurred, (2) it was material, and (3) based on the record as a whole, it probably resulted in harm. Vernon's Ann.Texas Rules Civ.Proc., Rule 327(a).

[3] NEW TRIAL k44(1)
275k44(1)
To show "probable injury" from jury misconduct so as to obtain new trial, there must be some indication in record that alleged misconduct most likely caused juror to vote differently than he would otherwise have done on one or more issues vital to judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 327.

[4] NEW TRIAL k143(2)
275k143(2)
To constitute an "outside influence," for purposes of rule providing that party seeking new trial based on jury misconduct can only inquire into whether outside influence infected deliberations, information must come from outside the jury, i.e., from a nonjuror who introduces information to affect the verdict. Vernon's Ann.Texas Rules Civ.Proc., Rule 327; Rules of Evid., Rule 606(b).
See publication Words and Phrases for other judicial constructions and definitions.

[5] NEW TRIAL k44(1)
275k44(1)
Comments and statements made by a juror to other jurors during deliberations are internal deliberations and do not amount to an "outside influence" bearing upon jurors so as to warrant new trial based on jury misconduct. Vernon's Ann.Texas Rules Civ.Proc., Rule 327; Rules of Evid., Rule 606(b).
See publication Words and Phrases for other judicial constructions and definitions.

[6] NEW TRIAL k20
275k20
To be entitled to a new trial based on a juror's false answers given during voir dire examination, there must be a

concealment by a juror in response to a specific and direct question calling for disclosure. Vernon's Ann.Texas Rules Civ.Proc., Rule 327.

[7] NEW TRIAL k20
275k20
Questions posed to jury panel as a whole, directly to specific panel members, and specifically to juror in question, asking the panel members to admit to any bias or prejudices that might prevent them from being fair, were sufficiently specific and direct, for purposes of seeking new trial based on juror's false answers given during voir dire.

[8] JURY k131(18)
230k131(18)
Juror who stated that she could be fair in response to direct question during voir dire on issue of bias was not a competent juror in personal injury action, where affidavits and testimony of other jurors showed that juror concealed her bias.

[9] NEW TRIAL k143(2)
275k143(2)
Jurors' affidavits and testimony pertaining to statements particular juror made after jury selection and during the course of jury deliberations did not involve outside influences and were not admissible to prove juror's bias, and thus was not ground for new trial based on jury misconduct. Vernon's Ann.Texas Rules Civ.Proc., Rule 327; Rules of Evid., Rule 606(b).

[10] NEW TRIAL k44(1)
275k44(1)
Jury's failure to follow court's instructions regarding proper jury conduct did not involve "outside influence," and thus such jury misconduct was not admissible as grounds for a

new trial. Vernon's Ann.Texas Rules Civ.Proc., Rule 327; Rules of Evid., Rule 606(b).
See publication Words and Phrases for other judicial constructions and definitions.

[11] JURY k33(2.10)
230k33(2.10)
Rule of Civil Procedure providing that juror testimony concerning juror misconduct is limited only to testimony as to whether any "outside influence" was brought to bear upon any juror unconstitutionally denied personal injury plaintiff right to fair and impartial jury. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15; Vernon's Ann.Texas Rules Civ.Proc., Rule 327(b).

[11] NEW TRIAL k143(2)
275k143(2)
Rule of Civil Procedure providing that juror testimony concerning juror misconduct is limited only to testimony as to whether any "outside influence" was brought to bear upon any juror unconstitutionally denied personal injury plaintiff right to fair and impartial jury. U.S.C.A. Const.Amends. 6, 14; Vernon's Ann.Texas Const. Art. 1, ' 15; Vernon's Ann.Texas Rules Civ.Proc., Rule 327(b).
***953** David Gaultney, Mehaffy Weber, Beaumont, for appellant.
Jacqueline Stroh, Benckenstein, Norvell & Nathan, Beaumont, for appellee.

Before WALKER, C.J., and BURGESS and STOVER, JJ.

OPINION

STOVER, Justice.

This appeal involves a personal injury suit. Ronald Jackson sustained injuries as a result of a bow accident occurring on October 5, 1991. The accident occurred while Jackson was using a newly purchased compound bow. The bowstring was drawn back, the bow slipped from Jackson's grip, and the tip of the cable struck him in the right eye. The initial trauma was to Jackson's right eye, socket area, nose, face, and head. The permanent resultant injuries consisted of a misalignment of the eyes, fixed pupil, problems with depth perception, and a visual field deficit. Golden Eagle Archery, Inc., was named as a defendant in the suit. Trial was by jury and Jackson was awarded monetary damages. In his appeal of what he considers an inadequate damage award, Jackson raises eight points of error.

In his seventh point of error, Jackson claims the trial court erred in denying a Motion for New Trial based on jury misconduct. The misconduct he complains of can be grouped into two forms: (1) during voir dire, a juror failed to reveal her bias towards this type of lawsuit, and (2) the jury failed to follow the court's instructions regarding proper jury conduct.

[1] We review jury misconduct under an abuse of discretion standard. Determining whether jury misconduct occurred is a question of fact for the trial court; if there is conflicting evidence on the issue, the trial court's finding must be upheld on appeal. Pharo v. Chambers County, Tex., 922 S.W.2d 945, 948 (Tex.1996).

[2][3] To establish jury misconduct, the complaining party must show (1) misconduct occurred, (2) it was material, and (3) based on the record as a whole, it probably resulted in harm. Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex.1985); Tex.R. Civ. P. 327(a). Determining the existence of probable injury is a question of law. Pharo,

922 S.W.2d at 950. "To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he 'would otherwise have done on one or more *954 issues vital to the judgment.' " Id., quoting Redinger, 689 S.W.2d at 419.

Review of jury misconduct is governed by Texas Rule of Civil Procedure 327 and Rule of Evidence 606(b). Tex.R. Civ. P. 327 provides:

> a. When the ground of a motion for new trial, supported by affidavit, is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.
>
> b. A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him

> concerning a matter about which he would be precluded from testifying be received for these purposes.

Tex.R. Evid. 606(b) is similar to Rule 327(b):

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rules 327(b) and 606(b) both preclude jurors from testifying about their deliberations. Under both rules, all testimony, affidavits, and other evidence is excluded from consideration when an issue of jury misconduct is raised unless it is shown that an "outside influence was improperly brought to bear upon any juror." Tex.R. Civ. P. 327(b); Tex.R. Evid. 606(b); Weaver v. Westchester Fire Ins. Co., 739 S.W.2d 23 (Tex.1987). This is a significant change from prior review of jury misconduct cases. Under former Rule 327(b), a juror was permitted to testify as to matters and statements, or "overt acts," occurring during deliberations. See Flores v. Dosher, 622 S.W.2d 573, 575 (Tex.1981); Strange v. Treasure City, 608 S.W.2d 604, 606 (Tex.1980). Presently, however, the only inquiry that can be made is whether an "outside influence" affected the

deliberations; all testimony, affidavits, and evidence are limited to this issue. Tex.R. Civ. P. 327(b); Tex.R. Evid. 606(b).

[4][5] Neither the Rules of Civil Procedure or the Rules of Evidence define "outside influence." Case law, however, has defined the term narrowly. To constitute an outside influence, information must come from outside the jury, i.e., from a non-juror who introduces information to affect the verdict. Wooten v. S. Pacific Transp. Co., 928 S.W.2d 76, 79 (Tex.App.--Houston [14th Dist] 1995, no writ); Baley v. W/W Interests, Inc., 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied). Since the amendments to Rule 327, comments and statements made by a juror to other jurors during deliberations are internal deliberations and do not amount to an "outside influence." Chavis v. Director, State Worker's Compensation Div., 924 S.W.2d 439, 447 (Tex.App.--Beaumont 1996, no writ).

To preserve error regarding jury misconduct, the complaining party must present evidence proving the misconduct at a hearing on a motion for new trial. Tex.R. Civ. P. 327; Tex.R. Civ. P. 324(b)(1). Jackson moved for a new trial based on alleged jury misconduct and a hearing was held. Supporting the *955 Motion for New Trial were affidavits from several jurors attesting to the occurrences of misconduct. Darold Frederick, a juror of the case, testified at the hearing. Golden Eagle's trial counsel objected to the testimony of Frederick arguing the affidavits attached to the motion were insufficient to require the court to hear testimony because there was no outside influence affecting the jurors' conduct. The trial court allowed the testimony based on Jackson's constitutional challenge to Rule 327(b).

FAILURE TO DISCLOSE BIAS OR PREJUDICE DURING VOIR DIRE

An erroneous or incorrect answer given by a potential juror during voir dire examination can constitute grounds for a new trial. See Tex.R. Civ. P. 327(a) set forth in full above. Jackson complains that, during voir dire, one of the jurors, Barbara Maxwell, did not disclose her bias against lawsuits and did not disclose that she had been on a previous wrongful death case in which the jury awarded zero damages. He contends the juror's misconduct was material, and, given the record as a whole, the misconduct resulted in harm.

During voir dire, Jackson's trial attorney asked the jury panel if any of them were biased against this type of law suit:

> [W]e're in this lawsuit concerning what we contend to be an unreasonably dangerous product that injured an unknowing consumer. And Mr. Jackson has a right to be here. He has a right to ask a Court in this county to render him a fair verdict; but there are people that, for many reasons, of their own, again, are opposed to this type of lawsuit. They just don't think that this ought to be done, that they're opposed to lawsuits. They don't think they ought to happen, that they can't render verdicts in this case, these types of cases, et cetera. If that is the case--of course, you're entitled to your opinions; and I would fight anybody for you to have that opinion. But if that's the case, you should not be on this jury because we are operating within the--within the parameters of the law; and we are doing something that Mr. Jackson has every right to do and every right to request of a Jefferson County jury.

> Is there anyone on this panel that right now would say, "Look, I just don't want to sit on this kind of jury. I need out of here. I don't want to be here. I can't be fair. These type of things bother me. I don't agree with the system, too much stress," whatever; that you want to tell the Judge, tell Judge Shuffield or me and [defense counsel] right now, "I don't want to be here"? If you do, I would ask you please to be honest and do that right now because our system depends on the integrity of our jury system and the integrity of jurors. Is there anyone here that says, "I can't do this"? Anyone?

One panel member did admit that he was biased against lawsuits. Jackson's attorney then asked if there was anyone else. No one responded. Further, Jackson's attorney discussed the type of monetary damages sought and asked the following:

> Is there anybody here, by the same token, who would just say, "Look, I just can't do that. I can't--I don't believe in it. I just can't give a verdict that means that somebody is going to have to pay a lot of money"? Anybody here that--again, if you do, now is the time. You owe it to yourself and you owe it to these people and to the Court to be honest about it because we--all we can do is ask you about it, but you have to tell us. Anybody here that could not do that?

There was no response from the jury panel. Trial counsel questioned the panel member who had earlier admitted to being biased. This panel member described how he worked for a grocery store where people frequently sued the store for slip and fall cases. He stated that he didn't "believe in lawsuits." The court asked if he had any preconceived notions that would prevent him from listening to the case

and answering specific questions. Trial counsel further stated: "If you can't put [your earlier experiences] aside and consider this case separately and independently from what happened [in other cases], if you can't do that, you need to tell us." The panel member responded: "I can't do it."

*956 Trial counsel then proceeded to ask the panel if any of them had served on a jury. Counsel asked each person who had indicated they had served on a jury if there was anything about their jury service that would affect their decision in this case. Ms. Maxwell responded that she had served on both a civil and criminal case. Trial counsel followed up the inquiry to her jury service:

> Q. What kind of case were you on?
> A. Both civil and criminal.
> Q. All right
> A. Civil was a wreck. A man was killed.
> Q. Did you--did you reach a verdict in that case?
> A. No.
> Q. Anything about that case that would keep you from being fair here?
> A. No, sir.

At the hearing on the Motion for New Trial, the bias or prejudice of Ms. Maxwell, as well as other forms of jury misconduct discussed below, was alleged as a ground for a new trial. The affidavits and testimony in support of the motion showed that Maxwell's bias toward this type of lawsuit was clearly exhibited to the other jurors during the course of trial and jury deliberations. Frederick's affidavit detailed how, during a recess of the trial, Ms. Maxwell communicated her bias towards the suit:

> [T]he juror Barbara Maxwell told me that she had been on a previous jury in which a family was suing for the death of another family member. Her comment was that

the jury she was on awarded nothing, and that she did not believe in "awarding money in stuff like that." She also said, "We are the ones that end up paying for it." Frederick's testimony further explained Maxwell's attitude. Her comments to Frederick were that the trial was "boring," she didn't "believe in lawsuits like this," and "[w]e are the ones that end up paying for it." The affidavit of Juror Shawn Lynch shows that Ms. Maxwell's bias towards the suit affected the verdict. In her affidavit, Lynch stated Maxwell strongly argued against the plaintiff throughout the deliberations and her view affected the jury's answers especially to questions involving comparative responsibility and damages. Lynch also stated Maxwell had stated this was a frivolous suit.

[6][7] Golden Eagle argues the questions asked of Ms. Maxwell at voir dire did not meet specificity requirements. To be entitled to a new trial based on a juror's false answers given during voir dire examination, there must be a concealment by a juror in response to a specific and direct question calling for disclosure. Soliz v. Saenz, 779 S.W.2d 929, 933 (Tex.App.-- Corpus Christi 1989, writ denied). Viewing the voir dire proceedings as a whole, it is very clear that Jackson's trial counsel was asking the panel members to admit to any bias or prejudices that might prevent them from being fair. Questions were posed to the panel as a whole, directly to specific panel members, and specifically to Ms. Maxwell. We find the questions were sufficiently specific and direct.

[8][9] The question of bias was directly posed to Ms. Maxwell. She answered that she could be fair and not let her prior experiences affect her opinion. The affidavits and testimony of other jurors show that she concealed her bias. Mrs. Maxwell was not a competent juror, thus, the whole panel was tainted. Mrs. Maxwell was subject to the

extraneous influence of bias, hence, she was not a competent juror. Since she was not a competent juror, the jury was not a proper constitutional tribunal. This principal is codified in Rule 327(a) which provides that a juror's bias or prejudice can amount to misconduct, and such misconduct, if it is material and the complaining party is harmed, can be grounds for a new trial. Rules 327(b) and 606(b), however, prevent testimony regarding the evidence of misconduct if the only evidence is that which emanates from jury deliberations. Here the misconduct of preconceived bias and the failure to disclose under present law does not involve an outside influence. The affidavits and testimony pertaining to statements of Ms. Maxwell were made after jury selection and made during the course of jury deliberations. Under present law, to Jackson's detriment and in violation of his constitutional rights, neither the affidavits nor the testimony of the jurors are admissible ***957** under Rules 327(b) or 606(b) to prove jury misconduct.

FAILURE TO FOLLOW COURT INSTRUCTIONS

In every jury trial the judge is required to give admonitory instructions to the jury regarding proper jury conduct. These admonishments are furnished to the jurors in writing and read aloud to them by the trial judge. Tex.R. Civ. P. 226a. The judge further instructs the jury that Texas law permits proof of any violation of the jury conduct rules and that a juror may be called upon to testify in open court about acts of misconduct.

Jackson contends jury misconduct occurred when the jury violated the instructions given by the court. The violations Jackson focuses upon are: Ms. Maxwell discussed the case with another juror prior to the beginning of jury deliberations; Ms. Maxwell communicated her bias against lawsuits during deliberations; the jury reached a

compromise verdict on damages and traded votes on answers to jury questions; and the jury improperly speculated on whether plaintiff had already received money from another source and whether plaintiff had been drinking.

The instructions given by the court admonished the jurors to not discuss the case among themselves until deliberations:

> "Do not even discuss this case among yourselves until after you have heard all of the evidence, the Court's charge, the attorneys' arguments, and until I have sent you to the jury room to consider your verdict." Additionally, the court advised: "[Y]ou're instructed that you should refrain from even discussing this case among yourselves during breaks or other times."

Likewise, the court's instructions advised the jurors to not let bias, prejudice, or sympathy play any part in their deliberations. As discussed above, the affidavit and testimony of Mr. Frederick from the hearing on the Motion for New Trial revealed that Mr. Frederick and Ms. Maxwell had a conversation, during a break prior to deliberations, where Ms. Maxwell revealed her bias towards this type of lawsuit. In addition, during deliberations, the affidavits and testimony in support of the Motion for New Trial showed that Ms. Maxwell communicated her bias numerous times.

The court's instructions specifically advised the jury to not trade answers. The supporting affidavits and testimony for the Motion for New Trial clearly showed that this instruction against trading votes was blatantly disregarded. Although the foreman advised the jurors against it, the jurors traded votes to answers concerning damage issues. The court instructions also advised the jurors to not

consider or discuss anything not represented by the evidence. The affidavits and testimony from the new trial hearing established a violation of this rule also. The jury improperly speculated as to whether Jackson had received a settlement from another party who may have been named as a defendant in the case and also speculated that Jackson may have been drinking alcohol prior to the accident.

[10] Generally, a violation of the admonitory instructions given under Rule 226a is to be determined by the requirements of Rule 327. Soliz, 779 S.W.2d at 934. However, in applying Rule 327, as determined by prior case law, the failure of a jury to follow a court's admonitory instructions can never amount to grounds for a new trial because such misconduct does not involve an "outside influence." See, e.g., Chavis, 924 S.W.2d at 447; Wooten, 928 S.W.2d at 76; Soliz, 779 S.W.2d at 932.

THE CONSTITUTIONALITY OF RULE 327

In Doucet v. Owens-Corning Fiberglas Corp., 966 S.W.2d 161 (Tex.App.-- Beaumont 1998, writ denied), we expressed our concerns as to the ever increasing lack of veracity of jurors on voir dire; however, the constitutionality of Rule 327(b) was not presented. We now address the conflict of Rule 327(b) with our constitutional mandate that the jury be composed of competent jurors free from bias and prejudice. Rule 327(b) literally makes it impossible to satisfy the constitutional mandate that the purity of the composition of the jury was maintained.

***958** At the new trial hearing, Jackson lodged a constitutional challenge to Rule 327(b) and we now address this question. The amended Rule 327(b) was designed to insulate most of the jury deliberation process from scrutiny with the effect of promoting full discussion

during deliberations and reducing juror harassment. Robinson Elec. Supply Co. v. Cadillac Cable Corp., 706 S.W.2d 130, 132 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). In achieving this goal, however, the rule goes too far in the wrong direction. The amended rule, although well intentioned, represents "something of a backward step in our continual pursuit of an improved judicial system." Id. at 133 (Draughn, J., concurring). If a juror fails to reveal a bias or prejudice towards a matter involved in the suit or a bias towards lawsuits or the legal system in general, even though specifically asked to reveal such opinion during voir dire, the party against whom the bias is directed has no recourse to correct resulting damage. The same result occurs when a jury fails to follow court instructions. The amended rules render the court's instructions virtually meaningless. See Baker v. Wal-Mart Stores, Inc., 727 S.W.2d 53, 56 (Tex.App.--Beaumont 1987, no writ) (Burgess, J., dissenting) ("The efforts of competent lawyers and judges to seat a jury with no preconceived ideas about a case and have it consider only evidence allowed under the rules are rendered meaningless when appellate courts allow jurors to inject other evidence during the deliberations. This deprives the litigants of a fair trial and makes a mockery of the trial judge's instructions."); Baley, 754 S.W.2d at 321 (Ellis, J., dissenting) ("By defining outside influence in the narrowest of terms, thereby precluding judicial inquiry into blatant and impermissible jury conduct, the majority denies appellants their right to a fair trial and, unwittingly, condones similar violations in the future. The admonitions of the trial court provided in Rule 226a are rendered meaningless. A rule not enforced is not a rule."). The result is that the misconduct, regardless of the severity or the effect on the verdict, remains unchecked. The complaining party can never correct the accruing harm and is left with absolutely no remedy. The end result is a grave injustice.

Trial by jury is a fundamental right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Additionally, the right is embodied in Article I ' 15 of the Texas Constitution:

> Sec. 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

[11] The constitution's reference not only to the right of trial by jury, but also to the purity of the jury, embraces the fundamental principles of impartiality and freedom from bias. Without the purity of the jury, there can be no administration of justice. The constitution means what it says: a jury composed of competent persons unaffected by bias or prejudice. If jury misconduct--whatever form it may take--is present, the integrity of the jury system is compromised, and a fair trial cannot be had. We find the imposition of Rule 327(b) prevents inquiry into the misconduct which occurred in this case. The rule denies Jackson his right to a fair and impartial jury trial and is in direct contravention of the constitution, and, as such, is unconstitutional. We find jury misconduct occurred, it was material, and based on the record as a whole, it resulted in harm. Jackson did not receive a fair trial. We cannot always have a perfect trial, but there must be a fair trial. We sustain appellant's point of error seven, therefore, we do not address appellant's remaining points of error. We, accordingly, reverse the judgment and remand the cause for another trial.

REVERSED AND REMANDED.

WALKER, Chief Justice, dissenting.

I respectfully dissent. The portion of the majority opinion with which I take issue begins with the following statement:

> In Doucet v. Owens-Corning Fiberglas Corp., 966 S.W.2d 161 (Tex.App.-- Beaumont 1998, writ denied), we expressed our concerns as to the ever increasing lack of veracity of jurors on voir dire; however, the constitutionality of Rule 327(b) was not presented. We now address the conflict of Rule 327(b) with our constitutional mandate ***959** that the jury be composed of competent jurors free from bias and prejudice. Rule 327(b) literally makes it impossible to satisfy the constitutional mandate that the purity of the composition of the jury was maintained.

In subsequently holding Rule 327(b) unconstitutional, the majority "burns the house to roast the pig." I will attempt to explain why, when construed properly in light of Rule 327(a), Rule 327(b) is not in fatal conflict with the Texas Constitution. In doing so, I will also show that the trial court did not err in overruling the appellant's motion for new trial. As I appreciate the majority's opinion, it had no quarrel with the trial court's August 14, 1996, ruling contained in a letter sent to each party. The letter stated in part:

> The plaintiff's first grounds [sic] for new trial stems from alleged jury misconduct. In support of this, the plaintiff offered the affidavits of several jurors as well as live testimony of a juror. All of the matters revealed by this evidence pertained to jury deliberations. As such, this evidence was incompetent to establish jury misconduct. Rule 327(b) T.R.C.P.; Durbin v. Dal-Briar Corp., 871 S.W.2d 263 (Tex.Civ.[sic] App.-- El Paso 1994, writ den'd) (and cases cited therein).

The record before us clearly indicates that the information contained in the affidavits concerning how Juror Maxwell attempted to influence other jurors was taken directly from the deliberation stage of the trial. The jurors had been provided with their written instructions and had been placed in the jury deliberation room when the discussions in question took place. Use of any information taken from the jury's deliberations is expressly prohibited by Rule 327(b). No interpretation of the rule is needed as this violates the exact letter of the rule. I, and apparently the majority, have no problem with this ruling.

However, as to the issue of jury misconduct regarding Juror Maxwell's deliberate failure to reveal her bias toward the type of lawsuit in question, the record before this Court indicates that the trial court recognized that certain portions of the affidavit and testimony of Juror Darold Frederick could be considered as evidence of Maxwell's voir dire misconduct. As I read Rule 327(a), the following portion of Juror Frederick's affidavit could have been properly considered by the trial court, notwithstanding Rule 327(b):

> At a recess during the trial after the testimony of the witness Mulaney, the juror Barbara Maxwell told me that she had been on a previous jury in which a family was suing for the death of another family member. Her comment was that the jury she was on awarded nothing, and that she did not believe in "awarding money in stuff like that". [sic] She also said, "We are the ones that end up paying for it." I reminded her that she had been asked about that by Mr. Smith and she gave no answer.

Clearly, this colloquy between the two jurors took place at a recess while testimony was still being taken during the

trial. In my opinion, this was not and never could be considered to have occurred "during the course of the jury's deliberations." Furthermore, Juror Frederick's affidavit quoted above does not even hint at "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith...." I would be more than willing to join the majority if it chose to expressly condemn cases such as Baley v. W/W Interests, Inc., 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied), which made the following bold pronouncement, (totally unsupported by any authority I might add):

> Any conversation regarding the case occurring between or among jurors is a part of jury deliberations regardless of the time and place where it occurs. To hold otherwise would reinstate the post-trial questioning of jurors under prior law. The present procedural and evidentiary rules restrict a juror's testimony solely to matters of "outside influence improperly brought to bear upon any juror."

Subsequent cases have supported Baley's position regarding "outside influence," as well as the scope of "jury deliberations." See Mitchell v. Southern Pacific Transp. Co., 955 ***960** S.W.2d 300, 322 (Tex.App.--San Antonio 1997, no writ); Wilson v. Texas Parks and Wildlife Dept., 853 S.W.2d 825, 831 (Tex.App.--Austin 1993), rev'd on other grounds, 886 S.W.2d 259 (Tex.1994).
My humble research has turned up no Texas Supreme Court opinion interpreting the scope of Rule 327(b), and with cases like Baley in the books, it is clear to see how use of Rule 327(b) has resulted in "the tail wagging the dog" vis a vis Rule 327(a). In my view, they are separate rules

and should be read in harmony whenever possible, not in conflict. See Owens--Illinois, Inc. v. Chatham, 899 S.W.2d 722, 732 (Tex.App.--Houston 1995 [14th Dist.], writ dism'd). Rule 327(a) explicitly mandates that a trial court "shall hear evidence thereof from the jury " on the issue of a juror giving an incorrect or erroneous answer on voir dire. Rule 327(a) is not modified by any reference to 327(b), nor is 327(b) modified by any reference to 327(a). In the instant case, the trial court apparently recognized a clear distinction between the two rules as is evident in his ruling on the misconduct issue regarding Juror Maxwell's voir dire responses:

Plaintiff next complains that a certain juror failed to disclose a bias towards lawsuits during the course of voir dire. During the voir dire proceeding, counsel for plaintiff asked the entire jury panel whether any of them, for any reason (identifying several potential reasons including bias against lawsuits), would not want to sit on the jury. While the evidence submitted in support of plaintiff's Motion for New Trial on the basis of jury misconduct would certainly support a conclusion that the juror in question had a bias towards product liability lawsuits, the question posed was a general "catch-all" question which has been held to be insufficient for purposes of new trial. See Durbin, supra; Soliz v. Saenz, 779 S.W.2d 929 (Tex. Civ. [sic] App.--Corpus Christi 1989, writ den'd) (and cases cited therein).

This ruling relies on two cases that place the rules in their proper context and apply them harmoniously. As pointed out by the SolizCourt, and also recognized in Durbin: [FN1]

FN1. Soliz v. Saenz, 779 S.W.2d 929 (Tex.App.--Corpus Christi 1989, writ denied); Durbin v.

Dal-Briar Corp., 871 S.W.2d 263 (Tex.App.--El Paso 1994, writ denied).

In certain circumstances, failure to disclose biases and prejudices during voir dire examination can amount to jury misconduct not affected by Rules 327(b) and [Tex.R. Civ. Evid.] 606(b). For instance, when a party discovers that a juror lied about a matter which reveals that the juror was clearly biased or prejudiced, this could amount to jury misconduct. See General Accident Fire and Life Assurance Corp. v. Coffman, 326 S.W.2d 287, 291-92 (Tex.Civ.App.--Waco 1959, writ ref'd n.r.e.). Soliz, 779 S.W.2d at 933. See also Durbin, 871 S.W.2d at 272. (emphasis mine).

In both Soliz and Durbin, the courts affirmed the respective trial courts' rulings denying the motions for new trial as the lies or misstatements by the jurors were discovered having emanated from inside the juries' deliberations. Again, I have no quarrel with a rule that protects the "sanctity" of the jury's deliberations, so long as it is indeed limited in scope to a time after the jury is given its instructions and commences to deliberate. Cases such as Baley apply a construction of Rule 327(b) which is strained to herniating proportions.

And if all of the above were not enough, the majority is flying in the face of the law which provides that in order to challenge a legislative or judicial enactment on constitutional grounds, a party must have suffered some actual or threatened restriction under the statute in question, and must contend that the statute unconstitutionally restricts his rights, not someone else's rights. See Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex.1995). In the instant case, the trial court's ruling on the issue of Maxwell's voir dire misconduct did not involve Rule 327(b) at all as the

trial court apparently did consider certain evidence accompanying appellant's motion for new trial. The trial court's ruling was based upon the apparent lack of specificity of the voir dire questions by appellant's trial counsel ***961** to Juror Maxwell which resulted in her misleading, if not false, responses. The majority has simply not shown, at least to my satisfaction, how, under the record before us, Rule 327(b) was even implicated in the trial court's decision on the voir dire misconduct issue. I would, therefore, overrule points of error seven and eight, and address the remaining points of error. Because the majority holds otherwise, I must dissent. [FN2]

FN2. The majority fails to note that the jury verdict in this case was 10--2 favoring plaintiff Jackson, and that juror Maxwell voted favorably for plaintiff.